FR-4

**SURFACE TRANSPORTATION BOARD**

**49 CFR Parts 1144 and 1145**

**[Docket No. EP 711 (Sub-No. 1)]**

**Reciprocal Switching**

**AGENCY:** Surface Transportation Board.

**ACTION:** Notification of public hearing.

**SUMMARY:** The Surface Transportation Board (Board) will hold a public hearing on March 15 and 16, 2022, concerning the reciprocal switching regulations it proposed in this proceeding. The hearing will be held in the Hearing Room of the Board's headquarters, located at 395 E Street, S.W., Washington, DC 20423-0001. All interested persons are invited to appear. In addition, the Board will pause the period for ex parte discussions, beginning January 24, 2022, and modify the instructions for ex parte communications in this proceeding to permit ex parte discussions with up to two Board members in the same meeting.

**DATES:** The hearing will be held on March 15 and 16, 2022, beginning at 9:30 a.m., in the Hearing Room of the Board's headquarters and will be open for public observation.[1] The hearing will be available for viewing on the Board's website. Any person wishing to speak at the hearing should file with the Board a notice of intent to participate (identifying the party, proposed speaker, and time requested) as soon as possible but no later than January 27, 2022. Written comments, including required written testimony by hearing participants, may be submitted by all interested persons by February 14, 2022.

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[1] The Board will provide additional instructions and requirements for facility entry in a subsequent decision. If the Board determines that the hearing should be held virtually, either entirely or in part, the Board will issue a subsequent decision by no later than March 1, 2022, indicating whether that is the case and containing registration instructions.

Hearing participants are required to submit written testimony by February 14, 2022. Additionally, by the same date, any interested person, including those who will not appear at the hearing, may submit written comments addressing matters related to the proceeding, including the areas of interest identified below.

**ADDRESSES:** All filings should be submitted via e-filing on the Board's website at www.stb.gov. Filings will be posted to the Board's website and need not be served on the other hearing participants, written commenters, or any other party to the proceeding.

**FOR FURTHER INFORMATION CONTACT:** Sarah Fancher at (202) 245-0355. Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877-8339.

**SUPPLEMENTARY INFORMATION:** In Reciprocal Switching (NPRM), EP 711 (Sub-No. 1) et al. (STB served July 27, 2016),[2] the Board proposed new regulations under which the Board would exercise its statutory authority to require rail carriers to establish switching arrangements in certain circumstances. The Board received numerous comments in response to the proposal. In addition, Board members have been participating in ex parte meetings with interested persons, and summaries of those meetings are posted in the docket pursuant to the procedure detailed in the NPRM. To allow interested persons to submit testimony to update the record, the Board will hold a public hearing and invite comments.

## Background

Competitive access generally refers to the ability of a shipper or a competitor railroad to use the facilities or services of an incumbent railroad to extend the reach of the services provided by the competitor railroad. The provisions of 49 U.S.C. 11102 and 10705 make three competitive access remedies available to shippers and carriers: the

[2] The proposed rule was published in the Federal Register, 81 FR 51149 (Aug. 3, 2016).

prescription of through routes, terminal trackage rights, and, as relevant here, reciprocal switching. Under reciprocal switching, an incumbent carrier transports a shipper's traffic to an interchange point, where it switches the rail cars over to the competing carrier. The competing carrier pays the incumbent carrier a switching fee for bringing or taking the cars from the shipper's facility to the interchange point, or vice versa. The switching fee is incorporated in some manner into the competing carrier's total rate to the shipper. Reciprocal switching thus enables a competing carrier to offer its own single-line rate to compete with the incumbent carrier's single-line rate, even if the competing carrier's lines do not physically reach a shipper's facility. NPRM, EP 711 (Sub-No. 1) et al., slip op. at 2.

Reciprocal switching can occur as part of a voluntary arrangement between carriers, or it may be ordered by the Board. Under section 11102, the Board may require the establishment of a switching arrangement when it finds that the arrangement either (1) is practicable and in the public interest, or (2) is necessary to provide competitive rail service. 49 U.S.C. 11102(c)(1). Section 11102(c)(1) authorizes the Board to establish the conditions of and compensation for switching service if the affected carriers cannot reach agreement on those matters within a reasonable period. The Board's implementation of section 11102 is guided by the rail transportation policy set forth in 49 U.S.C. 10101. See NPRM, EP 711 (Sub-No. 1) et al., slip op. at 16.

The Board's current regulations governing reciprocal switching were promulgated in 1985 by the Board's predecessor, the Interstate Commerce Commission (ICC), see Intramodal Rail Competition, 1 I.C.C.2d 822 (1985), aff'd sub nom. Balt. Gas & Elec. v. United States, 817 F.2d 108 (D.C. Cir. 1987), and are codified at 49 CFR 1144.[3] The regulations provide that reciprocal switching would only be prescribed if the agency

[3] 49 CFR 1144 also contains the Board's regulations governing through routes under 49 U.S.C. 10705.

determines that it "is necessary to remedy or prevent an act that is contrary to the competition policies of 49 U.S.C. [§] 10101 or is otherwise anticompetitive," and "otherwise satisfies the criteria of . . . [§] 11102(c)." 49 CFR 1144.2(a)(1). The Board's regulations also provide relevant factors that the agency shall consider in determining whether to prescribe competitive access, along with a "standing" requirement. 49 CFR 1144.2(a)(1)-(2). The regulations do not address how the Board should establish compensation for Board-ordered switching when the carriers cannot reach agreement within a reasonable period.[4]

In Midtec Paper Corp. v. Chicago & North Western Transportation Co., 3 I.C.C.2d 171 (1986), the first case where the ICC applied 49 CFR 1144.2, the agency explained that the key issue under its then-new regulations was whether the incumbent railroad "has engaged in or is likely to engage in conduct that is contrary to the rail transportation policy or is otherwise anticompetitive." Id. at 181. The ICC further explained that it would find anticompetitive behavior only when an incumbent carrier had "used its market power to extract unreasonable terms on through movements" or "because of its monopoly position . . . shown a disregard for the shipper's needs by rendering inadequate service." Id. The agency's competitive access regulations have not changed substantively since 1985 and few requests for reciprocal switching have been filed since then.

The Board proposed modified regulations as set forth in the NPRM.[5] NPRM, EP 711 (Sub-No. 1) et al., slip op. at 13-28. Under the Board's proposed regulations,

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[4] The Board's current regulations in Part 1144 also state that "[t]he Board will not consider product competition," and, "[i]f a railroad wishes to rely in any way on geographic competition, it will have the burden of proving the existence of effective geographic competition by clear and convincing evidence." 49 CFR 1144.2(b)(1)-(2). See also NPRM, EP 711 (Sub-No. 1) et al., slip op. at 27.

[5] The Board's proposal left in place the Board's existing regulations that govern through routes. See NPRM, EP 711 (Sub-No. 1) et al., slip op. at 26, 39-40.

there would be no need to show anticompetitive conduct, as had been required in the ICC's Midtec decision. Rather, under the Board's proposed regulations, the Board would require the establishment of a switching arrangement when the switching arrangement either was practicable and in the public interest or was necessary to provide competitive rail service. NPRM, EP 711 (Sub-No. 1) et al., slip op. at 16.

In assessing whether a switching arrangement would be practicable and in the public interest under the proposed regulations, the Board would consider whether the benefits of a proposed arrangement would outweigh its potential detriments. In making that determination, the Board would consider all relevant factors, such as (1) whether the arrangement would further the rail transportation policies in 49 U.S.C. 10101; (2) the efficiency of the proposed route; (3) whether the arrangement would allow access to new markets; (4) the impacts, if any, of the arrangement on capital investment, quality of service, and employees; (5) the amount of traffic that would be moved under the arrangement; and (6) the impact, if any, of the arrangement on the rail transportation network. NPRM, EP 711 (Sub-No. 1) et al., slip op. at 18.

In assessing whether a reciprocal switching arrangement would be necessary to provide competitive rail service, the Board would consider whether intermodal and intramodal competition were effective with respect to the movements for which the switching arrangement was sought. The Board would evaluate the effectiveness of competition using quantitative and qualitative factors that the Board has developed in the context of assessing market dominance in rate challenges, but it would not consider product competition or geographic competition. Id. at 27.

The Board's proposed regulations also state that reciprocal switching would not be ordered, even if one or both of the foregoing standards were met, if the switching was not feasible, would be unsafe, or would unduly hamper a carrier's ability to serve its customers. As additional limitations, the Board would require the establishment of a

switching arrangement only when (1) the shipper or receiver was served by a single Class I carrier; and (2) there was or could be, within a reasonable distance of the shipper or receiver's facilities, a working interchange between the incumbent carrier and another Class I rail carrier. Id. at 19-21.

The NPRM sought comments on two alternatives regarding the compensation the Board could impose for switching service if the carriers could not agree within a reasonable time period. Under the first alternative, compensation would be based on factors such as: (1) the geography where the proposed switch would occur; (2) the distance between the shipper/receiver and the proposed interchange; (3) the cost of the service; (4) the capacity of the interchange facility; and (5) other case-specific factors. The NPRM asked for comment on whether the agency should also consider what have been referred to as the incumbent carrier's lost contribution or opportunity costs. Under the second alternative, compensation would be based on the cost of providing the service plus a fair and reasonable return on the capital that was used to provide the service, analogous to the rental income that applies when the Board orders a carrier to provide trackage rights to another carrier (the Board's "SSW methodology"). (Id. at 25-26); see, e.g., New England Cent. R.R.—Trackage Rts. Ord.—Pan Am S. LLC, FD 35842 (STB served Oct. 31, 2017); St. Louis Sw. Ry.—Trackage Rts. over Mo. Pac. R.R.—Kan. City to St. Louis, 4 I.C.C.2d 668 (1987); St. Louis Sw. Ry.—Trackage Rts. over Mo. Pac. R.R.— Kan. City to St. Louis, 1 I.C.C.2d 776 (1984).

Overview of Comments

The NPRM generated divergent responses, briefly described below, from a variety of stakeholders.

Many of the comments address the scope of the Board's authority to promulgate revised competitive access regulations. Commenters who generally support the proposed regulations assert that the regulations are within the Board's statutory authority under

49 U.S.C. 11102(c). These commenters argue that the showing of anticompetitive conduct required in Midtec is not required by statute, as section 11102(c) establishes two bases for reciprocal switching: when "practicable and in the public interest" *or* when "necessary to provide competitive rail service." These commenters further argue that the proposed regulations (1) would not interfere with rail carriers' ability to set their own rates; and (2) would not offend any statutory right to the long haul, given that the statutory provision that supports a carrier's right to the long haul (49 U.S.C. 10705) is expressly conditioned by the Board's authority to require the establishment of switching arrangements.

In contrast, commenters who generally oppose the proposed regulations assert that the regulations would exceed the scope of the Board's statutory authority. These commenters argue that Congress authorized the Board to compel switching only upon a showing of anticompetitive behavior because railroads, as common carriers, undertake investment and operational responsibilities. These commenters further argue that, in the absence of anticompetitive behavior, the Board's order of a switching arrangement would impermissibly interfere with both the incumbent carrier's right to the long haul under section 10705 and carriers' discretion to engage in differential pricing, i.e., to charge rates that vary according to the elasticity of a shipper's demand.

The same commenters assert that, even if the proposed regulations fall within the Board's statutory authority, they are misguided as a matter of policy because they would drive rates down to the point of undermining carriers' ability to raise sufficient capital, thereby threatening the ability of carriers to make the investments necessary to maintain and operate the rail network efficiently and effectively. They also argue that the proposed approach would lead to switching arrangements that are economically inefficient.

Commenters who generally support the proposal counter that the proposed regulations would substantially advance the public interest. They argue that the proposed regulations would: (1) foster competition among rail carriers at a time when (due to mergers and acquisitions) shippers' rail transportation options are limited; (2) limit the availability of switching orders to certain locations and certain conditions, such that the current structure of the rail industry would largely remain in place; and (3) promote competition and efficiency in the U.S. economy overall.

Many commenters urge the Board to adopt revisions to the proposed regulations. Some sought more specific standards or thresholds for when the Board would require the establishment of a switching arrangement. Some suggest expanding the availability of Board-prescribed switching, for example by making it available to shippers who are served by more than one Class I carrier, shippers who are served by carriers other than Class I carriers, or shippers who are seeking to switch to a carrier other than a Class I carrier. Several commenters urge the Board to adopt streamlined procedures for reviewing requests for switching arrangements, while others offer proposals on how to allocate the burden of proof in switching proceedings.

In response to an invitation in the NPRM, many commenters address what would constitute a reasonable distance between a shipper's facilities and a location where the Board could require switching. Commenters who generally support the proposed regulations suggest that what constitutes a reasonable distance should be liberally construed. Some advocate a mileage-based approach to determining a reasonable distance. Others suggest that what constitutes a reasonable distance should turn on case-by-case operational considerations, such as where a switch could be accomplished effectively. Commenters who generally oppose the proposed regulations argue, in contrast, that the Board's authority to require the establishment of switching arrangements is limited to terminal areas.

Also in response to an invitation in the NPRM, many commenters address how the Board should establish compensation for switching if carriers cannot reach agreement within a reasonable time. Some commenters assert that compensation should include a contribution to the fixed and common costs of the incumbent carrier's network that the carrier would have recouped from the switching shipper. Other commenters disagree, suggesting that this approach would unreasonably require a shipper to pay twice for service. Most of these commenters assert that compensation should be based on the incumbent carrier's fully allocated cost of providing that service, including a reasonable rate of return on the capital that is used to provide the service.

## Public Hearing

The Board will hold a public hearing in this proceeding on March 15 and 16, 2022. Participants in the hearing may address the issues described below and any other matters relevant to this proceeding. Hearing participants are required to submit written testimony by February 14, 2022.

## Comments Requested

Since the issuance of the NPRM and the Board's receipt of written comments and the occurrence of some of the ex parte meetings, there have been significant operational changes in and affecting the freight rail industry. For example, Class I carriers have changed their means of designing rail service. Commenters may have additional or modified views on the effects and/or need for the proposed regulations.

To ensure a full and updated record in this proceeding, the Board invites written comments on several broad areas of interest. First, comments may identify new developments (i.e., developments that have occurred since the Board previously invited comments in this proceeding) that a commenter finds are relevant to a final decision in this matter and address any change or significant development in a commenter's views since the previous round of comments. Second, comments may address topics that were

discussed in ex parte communications that have taken place since October 25, 2016, in this proceeding.[6] Participants should understand that the Board has reviewed the comments filed to date, and that repeating those same arguments in the written comments is strongly discouraged.

Written comments on these areas of interest may be filed by any interested person, regardless of intent to participate at the hearing, by February 14, 2022. Those intending to participate at the hearing may include in their written testimony comments on the issues raised above and any other matters relevant to this proceeding.

Pause of the Ex Parte Period and Modification of the Ex Parte Waiver

As discussed in the NPRM, the Board provided a limited waiver of the ex parte prohibitions that otherwise apply to this proceeding.[7] Many stakeholders and interested persons have met with Board members, and summaries of those meetings are posted in the public docket. Beginning January 24, 2022, the Board will pause the scheduling of any further ex parte communications until the completion of the hearing set for March 15-16, 2022. The period for further ex parte communication will resume following the hearing and will close on April 6, 2022. Although allowing for the resumption of ex parte meetings will provide an opportunity for hearing participants and other interested persons to address any matter that may remain to be addressed following

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[6] A party must submit a summary of an ex parte meeting it participated in within two business days of the meeting, per the instructions set forth in the NPRM. Should a party wish to reply to a meeting summary, it must do so within the time period for written comments, set out above. To ensure adequate time for parties to consider ex parte meeting summaries in advance of the deadline for written comments, the Board expects that summaries of meetings held between now and January 21, 2022, will be posted to the docket within five business days of submission, but not later than February 4, 2022.

[7] In 2018, the Board revised its regulations to permit ex parte communications in informal rulemaking proceedings pursuant to specified procedures. See Ex Parte Commc'ns in Informal Rulemaking Proc., EP 739 (STB served Feb. 28, 2018); 49 CFR 1102.2(g). However, those regulations do not apply to informal rulemaking proceedings, such as this one, that were initiated prior to April 4, 2018.

the hearing, all interested persons should endeavor to make their hearing presentations, both written and oral, complete so that the hearing will be as comprehensive as possible, repetition can be avoided, and the record in this matter can be closed expeditiously.

The Board will also modify the procedures for such ex parte communications to allow ex parte discussions with up to two Board Members in the same meeting, with the consent of the Board Members with whom the meeting is requested. When the NPRM was issued, the Board was composed of three Board members, such that two members constituted a majority, which could have implications under the Government in the Sunshine Act, 5 U.S.C. 552b. Accordingly, the NPRM specified that if a party wished to meet with multiple Board members, separate meetings must be scheduled. NPRM, EP 711 (Sub-No. 1) et al., slip op. at 29. Given that two members no longer constitute a majority under the Board's current composition (and provided the composition remains at no fewer than four members), interested persons may have ex parte discussions with up to two members between now and the closing of the period for ex parte communications.

BOARD RELEASES AND TRANSCRIPT AVAILABILITY: Decisions and notices of the Board, including this document, are available on the Board's website at www.stb.gov. The Board will issue a separate notice containing instructions for attendance at the hearing and the schedule of appearances. Once the transcript is available, it will be posted on the Board's website.

It is ordered:

1. A public hearing will be held on March 15 and 16, 2022, at 9:30 a.m., in the Hearing Room of the Board's headquarters, located at 395 E Street, S.W., Washington, DC 20423-0001.

2. The period for ex parte communications in this proceeding will be paused beginning January 24, 2022, and will resume from March 17, 2022 until April 6, 2022.

3. By January 27, 2022, any person wishing to speak at the hearing shall file with the Board a notice of intent to participate identifying the party, the proposed speaker, and the time requested.

4. Written testimony and written comments shall be filed by February 14, 2022.

5. Filings will be posted to the Board's website and need not be served on any hearing participants or other commenters.

6. This decision is effective on its service date.

7. This decision will be published in the Federal Register.

Decided: December 27, 2021.

By the Board, Board Members Fuchs, Oberman, Primus, and Schultz.

**Kenyatta Clay,**

*Clearance Clerk.*

[FR Doc. 2021-28396 Filed: 12/30/2021 8:45 am; Publication Date: 1/3/2022]